APPEAL NO. 052757
FILED FEBRUARY 9, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on October 27, 2005. The hearing officer resolved the disputed issues by deciding that: (1) the respondent (claimant) has not reached maximum medical improvement (MMI); (2) since the claimant has not reached MMI his impairment rating (IR) is premature; and (3) the first certification of MMI and IR did not become final under 28 TEX. ADMIN. CODE § 130.12(b) (Rule 130.12(b)). The appellant (carrier) appealed, contending that the hearing officer's MMI, IR, and finality determinations are against the great weight and preponderance of the evidence and that the hearing officer had applied the wrong legal standard. The claimant responded, urging affirmance.

DECISION

Reversed and remanded.

It is undisputed that the claimant sustained a compensable right shoulder injury on ___; he had surgery to his right shoulder on August 23, 2004; and the designated doctor examined the claimant on January 14, 2005, certifying that the claimant reached MMI on that date with a five percent IR. The hearing officer, in unappealed determinations, found that the claimant received the designated doctor's first certification of MMI and IR on February 8, 2005, and that the 90th day after February 8, 2005, was May 9, 2005. Within that 90-day period, the claimant had a post-surgery MRI of the right shoulder that showed a partial tear. Based on that MRI, the claimant's treating doctor sent a letter to the Texas Department of Insurance, Division of Workers' Compensation (Division) disputing the claimant's MMI and IR. In response, the Division requested a letter of clarification from the designated doctor and forwarded copies of the papers to the claimant. The Dispute Resolution Information System (DRIS) notes in evidence show that on April 25, 2005, the claimant contacted the Division to inquire about papers he received from the Division and that he was told to wait until the designated doctor responded to a letter of clarification. In a letter dated April 26, 2005, the designated doctor responded that he would not change his certification of MMI and IR. A DRIS note dated May 9, 2005, shows that the claimant contacted the Division and was told that "if he still wants to dispute" the designated doctor's report then he needs medical evidence contrary to designated doctor's report. After the 90th day, the claimant had a second surgery to his right shoulder on June 23, 2005.

Section 408.123(d) provides that except as provided in subsections (e), (f), and (g), the first valid certification of MMI and the first valid assignment of IR to an employee are final if the certification of MMI and/or the assigned IR is not disputed within 90 days after written notification of the MMI and/or assignment of IR is provided to the claimant and the carrier by verifiable means. Rule 130.12(a) provides in pertinent part that the certifications and assignments that may become final are: (1) the first valid certification

of MMI and/or IR assigned or determination of no impairment. Rule 130.12(b)(1) provides that only an insurance carrier, an injured employee, or an injured employee's attorney or employee representative under 150.3(a), may dispute a first certification of MMI or assigned IR under Section 141.1 (related to Requesting and Setting a Benefit Review Conference (BRC)) or by requesting the appointment of a designated doctor, if one has not been appointed. In addition, Rule 141.1(c) permits an unrepresented claimant to request a BRC by contacting the Commission [now known as the Division] in any manner.

Although not stipulated it is undisputed that the claimant was unrepresented at the time he contacted the Division. The preamble to Rule 130.12 states that pursuant to Rule 141.1(c) "[a]n unrepresented employee may contact the commission in any manner to indicate an MMI/IR dispute is being raised. However, it will be the responsibility of an unrepresented employee providing oral notice of a dispute to affirmatively prove that communication with the commission took place and is noted in commission records." 28 Texas Register 7607, September 5, 2003.

At issue was whether the claimant's contact with the Division was sufficient to dispute the designated doctor's first certification of MMI/IR under Rule 130.12(b). The hearing officer's conclusion of law and decision states that the first certification of MMI and IR did not become final under Rule 130.12(b), however the hearing officer's finding of fact states that the Division's action constituted a dispute of the first certification of MMI/IR, rather than the claimant's contact with the Division constituted a dispute. Rule 130.12(b) expressly states that only an insurance carrier, an injured employee, or an injured employee's attorney or employee representative under 150.3(a) may dispute a first certification of MMI/IR. There is no provision in the statute or rules by which the Division may dispute the first certification of MMI/IR. The hearing officer's finding of fact is erroneous.

The hearing officer's Discussion section is inconsistent with that erroneous finding of fact. The hearing officer states the claimant's inquiry "[a]t the very least, it indicated an approval of his treating doctor's pursuit of an MMI/IR dispute on Claimant's behalf." This statement suggests that the hearing officer believed that the claimant's inquiry constituted a dispute, however he makes findings that the claimant, through his wife, called "the Division to inquire as to the meaning of the papers that they had just received from the Division" (Finding of Fact No. 14) and that the Division's action constituted a dispute of the first certification of [MMI/IR] of the designated doctor (Finding of Fact No. 15). We are remanding the finality issue to the hearing officer to determine whether the claimant's contact with the Division was sufficient to dispute the designated doctor's first certification of MMI/IR under Rule 130.12(b).

Since the finality issue has been reversed and remanded for reconsideration, the hearing officer's determinations that the clamant has not reached MMI and since the claimant has not reached MMI his IR is premature are reversed and remanded for a decision consistent with the hearing officer's finality determination. On remand, the hearing officer shall consider all the evidence, make findings of fact and render

conclusions of law regarding the finality, MMI, and IR issues, consistent with the statute and the rules discussed herein. We direct the hearing officer not to consider additional evidence on remand.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202, as amended effective June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of time in which a request for appeal or a response must be filed.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
701 BRAZOS, SUITE 1050
AUSTIN, TEXAS 78701.

_____
Veronica L. Ruberto
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Margaret L. Turner
Appeals Judge